

OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Thomas J. Moyer
Chairman



David Diroll
Executive Director

Minutes of the OHIO CRIMINAL SENTENCING COMMISSION and the CRIMINAL SENTENCING ADVISORY COMMITTEE March 15, 2001

SENTENCING COMMISSION MEMBERS PRESENT

Common Pleas Judge H.J. Bressler, Vice-Chair
Victim Representative Sharon Boyer
Becky Herner, representing State Public Defender David Bodiker
OSBA Delegate Max Kravitz
Mayor James McGregor
City Prosecutor Steve McIntosh
Police Chief James McKean
Common Pleas Court Judge John D. Schmitt
Public Defender Yeura Rommel Venters
Prosecutor Greg White

ADVISORY COMMITTEE MEMBER PRESENT

John Madigan, Sr. Attorney, City of Toledo

GUESTS PRESENT

Mark DeZarn, Asst. Prosecutor, Montgomery County Prosecutor's Office
David Muhek, Asst. Prosecutor, Lorain County Prosecutor's Office

STAFF PRESENT

Scott Anderson, Staff Attorney
David Diroll, Executive Director
Fritz Rauschenberg, Research Coordinator
Cynthia Ward, Administrative Assistant

The March 15, 2001, meeting of the Ohio Criminal Sentencing Commission was called to order by the Vice-Chair, Common Pleas Court Judge H.J. Bressler, at 10:15 a.m.

DIRECTOR'S REPORT

Director David Diroll reviewed the contents of the meeting packets, which included an outline of Ohio's forfeiture statutes, prepared by David Muhek of the Lorain County Prosecutor's Office, and minutes from the February meeting. Mr. Diroll thanked Atty. Muhek for the outline.

FORFEITURES

Staff attorney Scott Anderson welcomed Asst. Pros. Mark DeZarn from the Montgomery County Prosecutor's Office, a prosecutor who deals exclusively with forfeiture cases.

Mr. Anderson noted that Asst. Pros. Muhek's outline summarizes the nine basic forfeiture provisions in Ohio law. It includes recent amendments. It covers provisions relating to innocent owners, burden of proof, filing timelines, complaint procedures, seizure warrants, compensation, due process, criminal versus civil forfeiture designations, restraining orders, restitution to victims, and forfeiture procedure issues for each provision.

Asst. Pros. Muhek noted that the outline includes all forfeiture provisions other than those found in Chapter 45, Ohio's Motor Vehicle Law. He then described each of the statutes.

§1531.20--Unlawful Taking of Animals. This forfeiture statute offers the least protection. There is no innocent owner or burden of proof provision because it only applies if the user or owner is convicted. The *in rem* proceeding must be within 5 days of conviction. The action, Asst. Pros. Muhek noted, is initiated by the Division of Wildlife. Forfeited funds go to the Division.

§2923.32--Criminal Corrupt Activity. The criminal corrupt activity forfeiture statute has an innocent owner provision. The burden of proof is beyond a reasonable doubt because the items must be listed in the indictment and there must be a special verdict of forfeiture. Then a proceeding takes place relative to other persons interested in the property. It applies to real and personal property.

The burden is on the prosecutor to learn if anyone else has an interest in the property and to notify the person, through certified mail or publication, of the forfeiture verdict. A petition must be filed within 30 days of receipt of the judgement of forfeiture. The owner then has the burden to prove by a preponderance of the evidence that he or she is an innocent owner. If the burden is met, the judgment is amended and the property is excluded.

There is no specific time for filing. The entry of the special verdict starts the time running. Although the statute has no seizure warrant provision, the judge can order the property seized after a forfeiture judgment is rendered.

The statute offers no provision for attorney fees and there is no provision for the release of property, but there are protections for *bona fide* purchasers when the property is otherwise beyond reach of the court.

There is no provision for compensation for damages, nor is there a statute of limitations.

§2923.34--Civil Corrupt Activity. Under the civil statute for this offense, the burden of proof of preponderance of the evidence is on the plaintiff, which could be the State or a private party. The Civil Rules apply. So, a complaint is filed, and response must be given within 20 days.

Max Kravitz, representing the Ohio State Bar Association, voiced concerns about litigating third party interest claims. He wondered if a third party could intervene earlier in the case on the basis of hardship. If someone comes in as a third party at the end of the case, claiming that the property was hers, she has no right to a trial. Yet, Ohio's Constitution provides for a jury trial in civil cases when the matter in dispute is over \$20. In this case, he wondered how the third party claim could be litigated. He feels it would help to allow a jury to decide the third party's innocent owner status.

It is litigated in the context of the hearing in front of the judge, Asst. Pros. Muhek responded. Under the criminal statute, no, said Asst. Pros. Muhek, but under civil statute, it is arguable because Civil Rules are supposed to

apply, though he knows of no case where a third party innocent owner ever asked for a jury trial.

According to Federal law, said Atty. Kravitz, the right to a jury trial in a civil case is dependent on what actions were tried by a jury at the time the constitutional provision was enacted. This brings up two key issues, he said: 1) how to deal with innocent owner third party claims; and 2) whether third parties have the right to a jury trial if the prosecution contests.

In a criminal case, the third party innocent owner gets notice, said Asst. Pros. Muhek.

The innocent owner is protected if he or she claims an interest in the property after receiving notice, said Common Pleas Court Judge John Schmitt. He or she has a right to come forth and prove ownership at a separate hearing. In a criminal case, he noted, the judge is going to decide subsequent to a criminal proceeding whether ownership is established by the third party.

The third party innocent owner also does not get appointed counsel to get the property back, said Atty. Kravitz. They are forced to hire their own attorneys, which few can afford. He suggested paying third party attorney fees if they prevail. That, he feels, would give law enforcement incentive to resolve these cases by negotiation.

If that is offered, remarked Pros. Greg White, then the system may as well provide attorney fees to defendants that are acquitted as well, since the same theory applies.

They already get the right to counsel and attorney fees under the criminal statute, Atty. Kravitz replied.

Asst. Pros. Muhek explained that civil proceedings are actions against the property. Thus, the right to counsel does not apply. Mr. Anderson suggested that the problem is with using the word "innocent", because innocence intimates criminal proceedings. He wondered if it might be more of an analytical problem based on voicing innocent owner claims in civil court.

There are issues of culpability, said Pros. White, unless it is contraband.

Returning to §2923.34, Asst. Pros. Muhek noted that Civil Rules apply. He added the civil statute has a 5 year statute of limitations following termination of conduct. However, that period is suspended during pendency of the criminal case and for 2 years thereafter.

Judge Schmitt asked how often §2923.34 is used. Rarely, responded Pros. White. He believes it is intended to allow attorneys to bring Civil RICO actions.

Atty. Kravitz remarked that it is no different than federal Civil RICO statute, which includes treble damages among other things. He expressed surprise that these are not filed more often.

The point, declared Pros. White, is that there are already protections available in Ohio's civil RICO statute for innocent owners.

Continuing, Asst. Pros. Muhek remarked that there is no seizure warrant under this civil statute, but the judge can order property seized after judgment of forfeiture. Also, on motion, the judge can preserve the property or "reachability" of the property through a restraining order after notice and hearing. He noted that Civil RICO is the only provision allowing an award of attorney fees and costs for civil action.

§2925.42--Criminal Felony Drug Offenses. Forfeiture for felony drug offenses is broader in scope than some of the other statutes, said Asst. Pros. Muhek.

The statute applies to real and personal property used in or derived from felony drug activity. The statute includes innocent owner provisions. The burden of proof is on the State by a preponderance. It has a rebuttable presumption that interest in the property is subject to forfeiture if acquired near the time of the offense. The deadline to petition to file a claim is within 30 days after notice.

Becky Herner, representing the State Public Defender, asked for a definition of the phrase "near the time of the felony drug offense". How recently, she wondered, must the property have been purchased? There is no case law available to help define that issue, said Pros. White, because prosecutors do not trace proceeds or assets.

Continuing, Asst. Pros. Muhek noted that there is a provision for seizure warrants but no provision for attorney fees. There is no provision for release of property pending trial nor for compensation for damage to seized property. However, a financial institution can recover on its lien or mortgage through a separate civil proceeding.

There is a civil forfeiture alternative to the criminal forfeiture for felony drug cases, which can be instituted prior to prosecution.

While the case is pending, the court can order a temporary restraining order, injunction, or other civil restraining order to preserve the "reachability" of the property subject to forfeiture.

Atty. Kravitz believes this provision is offered so that prosecutors will not have to trace the actual cash used in the offense, but, instead, can take any cash available if the individual has mixed lawful and unlawful cash together. If the person has placed the assets outside the reach of seizure, then the prosecutor can look to "substitute assets" to satisfy the forfeiture. The prosecutor can reach property that is not in possession of the government, such as a car in the Cayman Islands. He cannot restrain substitute assets prior to trial, but is permitted to look to substitute assets in order to satisfy a judgment of forfeiture. Atty. Kravitz feels that this option can alleviate some of the problems with forfeiture of certain property.

§2925.43--Civil Felony Drug Offenses. The civil counterpart of the criminal drug forfeiture statute includes an innocent owner provision and a clear and convincing standard with the burden of proof on the State. It applies to all types of property used in or derived from felony drug activity. The State must serve interested parties with notice and file claims within 30 days of notice.

It might simplify matters, suggested Mr. Anderson, if there were a standard notice provision of perhaps 30 days for all criminal forfeiture statutes while civil cases would follow Civil Rules.

Asst. Pros. Muhek noted this section does not require conviction, and allows a stay if a criminal proceeding has been filed.

Some judges give the government a stay and some do not, said Atty. Kravitz.

The statute, continued Asst. Pros. Muhek, includes a seizure warrant with probable cause. There is no attorney fee provision, nor any specific statute of limitation. No release of property pending trial is allowed, except for financial institutions, which may file civil action to release property.

§2933.41--Disposition of Property Held by Law Enforcement. This statute covers lost, abandoned, seized or forfeited property held by law enforcement agencies that is no longer needed as evidence, said Asst. Pros. Muhek. The statute contains no innocent owner provision, per se, but every effort is made to locate the person entitled to the property.

If there are any hearings relative to this provision, then Civil Rules and proceedings apply because it is criminal in nature but civil in form.

According to John Madigan, Toledo uses this statute on occasion as a quasi-civil penalty to seize vehicles used to solicit prostitutes and for similar misdemeanor violations.

Montgomery County, said Asst. Pros. DeZarn, uses the statute mostly to clear out the property room.

This forfeiture statute, said Atty. Kravitz, may be designed to allow the cleaning out of property rooms, but it also allows other legal action to be taken, as indicated by Atty. Madigan.

The property would have to be beyond the purview of §§2933.42 and 2933.43 before it can be applicable to §2933.41, said Asst. Pros. DeZarn.

Some counties hold that the statute is limited to property forfeited under felony offenses, Atty. Kravitz remarked, whereas other counties claim the statute allows use for misdemeanors as well.

Montgomery County uses this statute for misdemeanor gambling and prostitution offenses (e.g., gambling devices or items bought with prostitution money), said Asst. Pros. DeZarn. He noted that two magistrates hear all forfeiture cases in Montgomery County.

Atty. Kravitz declared that forfeiture was intended as punishment, not to raise revenue. That is why most statutes reserve it for felonies. If this particular statute is being used to affect forfeitures in misdemeanor cases, he insists that it creates a fundamental issue that must be addressed.

If this statute is being used for misdemeanors, it is only because some of the old law remains, Pros. White claimed. Whether or not it should be allowed in misdemeanors, he feels the key is that the statute must pass constitutional muster through forfeitures that are proportionate to the offense.

If filed civilly, then Atty. Kravitz wondered how the proceedings in these cases could be regarded as criminal in nature. Because somehow the property was linked to a crime, Asst. Pros. Muhek answered.

§2933.41 contains no time limit for filing complaints, Asst. Pros. Muhek continued. Law enforcement must make a reasonable effort to notify people entitled to possession. In absence of identifying information, law enforcement may advertise in a newspaper and invite people to view and establish their right to the property. He noted that double jeopardy precludes forfeiture action under this statute where a criminal case has been dismissed or where the defendant has been sentenced in a criminal case (*State v. Casalicchio*).

Since this statute does not require a conviction before the property is forfeited, Atty. Kravitz felt there should probably be some type of provision specifying when an owner can file a complaint.

Mr. Anderson asked about the facts in *State v. Casalicchio*.

According to Asst. Pros. DeZarn the case pertained to a felony indictment and conviction in a complicated drug case involving a Corvette. Law enforcement realized they had initially failed to go after the vehicle and attempted to do so two months later. Montgomery County, he said, interprets *State v Casalicchio* to mean that the petition must be filed concurrent with the criminal case, and not after the criminal case has been concluded or the defendant has been sentenced. It permits the prosecutor to file both civilly and criminally in separate actions contemporaneously.

In Franklin County, Atty. Kravitz claimed, the prosecutor almost never files for forfeiture until after a criminal conviction beyond a reasonable doubt, and then he files a civil complaint.

Asst. Pros. DeZarn said that he files primarily under §2933.43. He files the petition simultaneously with the criminal action. The hearing, he noted, has to be set within 45 days from the day the plea is entered.

If you wait until after the criminal case ends to file the civil action, case law says you lose because you filed too late, said Asst. Pros. Muhek.

Asst. Pros. Muhek said §2933.41 is used in context of the defendant's property in a criminal case before sentencing and to clean out the property room.

§2933.43--Contraband. This statute contains an innocent owner provision and an extensive provision for motor vehicles, said Asst. Pros. Muhek. A motor vehicle generally cannot be retained longer than 72 hours without specifically asking the court for more time. A motor vehicle can also be released to the owner on the posting of bond, even if the owner is charged with a crime.

The burden of going forward is on the State. It must show by a preponderance of the evidence that the property is contraband and should be forfeited. However, no property is forfeited if the owner can show by a preponderance of the evidence that he or she neither knew nor should have known after reasonable inquiry that the property was used in a violation.

The statute applies to contraband as defined in §2901.01(A)(13) (property which is unlawful to possess, was used in crime, or proceeds of illegal activity). The prosecutor must file a petition for contraband seized and then serve interested parties. A hearing must be held within 45 days of seizure and can only be extended by a showing of good cause.

The statute contains no provision for a seizure warrant, attorney fees, or a statute of limitation.

The property can be released to the owner if it is not needed as evidence, but a bond would have to be posted in the amount of the fair value of that property. If the property is contraband due to its relationship to an underlying criminal offense, there can be no forfeiture hearing until after the person is convicted of or pleads guilty to the underlying offense.

The statute contains specific statutory distribution. First, forfeited property may be used by the law enforcement agency. If sold by public sale without appraisal, the proceeds go first to storage and associated costs, then to any lienholder, then as required by statute, including provisions for drug and alcohol programs.

§2913.34--Trademark Counterfeiting. This statute applies to goods bearing a counterfeit mark and tools or other articles offered for sale or used to violate the trademark counterfeiting law.

Items seized under this statute are destroyed upon conviction or a guilty plea, unless disposition in another manner is specified by the trademark's owner, such as donation to a youth service organization.

The statute contains no innocent owner provision and no provision for a seizure warrant. There is no burden of proof since it follows conviction or a guilty plea.

\$2923.44--Criminal Gangs. This statute, said Asst. Pros. Muhek, is relatively new and one of the most comprehensive. It involves property used or intended for use in, or derived from, gang activity. The statute contains provisions for an innocent owner defense, a seizure warrant, and recognition of financial institution or mortgagee interests. It does not contain a provision for attorney fees or for compensation of damage.

The burden of proof is on the State, with a standard of beyond a reasonable doubt. The statute also has a bona fide purchaser protection built in. A claim must be filed within 30 days of notice. The defendant loses title to property used, intended for use in, or derived from gang activity. Only the underlying criminal action has a statute of limitations.

Simplifying Forfeiture Law. \$2923.44 seems to be the best written and most straightforward, said Judge Bressler. He wondered why it couldn't be used as a model for the other statutes. He asked whether it is possible to condense forfeiture into one or two statutes patterned on the gang forfeiture statute.

Pros. White contended that using one statute to address all of the nuances in all the forfeiture laws would require an enormous statute. Plus, he insisted, prosecutors would not know where to look to find the appropriate charges or procedures for those specific issues.

One condensed statute is better than a dozen incomprehensible statutes, Atty. Kravitz declared.

Rather than trying to condense forfeiture law into one or two statutes, Mr. Diroll suggested a series of statutes in one forfeiture chapter.

That suggestion was strongly favored by Atty. Kravitz but Pros. White fears it will necessitate having to add new definitions and new provisions. He contended that, in the long run, it would not be simplifying matters.

Judge Bressler questioned why the Commission is even working on the issue of forfeitures. Mr. Diroll explained that, prior to becoming Attorney General, Sen. Betty Montgomery added an amendment to a bill in 1994 that the Sentencing Commission should examine forfeiture law.

Judge Bressler asked where the Commission should attempt to go with the issue.

S.B. 2 initially simplified the felony statutes, said Pros. White, but now it is all confusing again, due to numerous other bills.

There are fewer crime bills before the legislature now than there were in the 1990's, said Mr. Diroll. Perhaps, he suggested, the Commission could recommend some simplification again.

Pros. White fears that any attempt to further simplify the felony or forfeiture statutes will only result in them becoming more convoluted once they go through the legislative process. He prefers to work on due process issues and how to prevent forfeitures that should not occur.

Other Forfeiture Issues. Although Atty., Kravitz would prefer to see forfeiture money go to the general revenue fund, he understands that much of it will continue to go to law enforcement. Nevertheless, he wants the Commission to at least address due process issues for forfeiture cases. In his opinion, the most important issues to address are:

- 1) Provide for pre-trial release of appropriate assets which do not harm prosecution of the case, either because of hardship or in order to obtain counsel;
- 2) Provide in civil forfeiture cases for attorney's fees for a prevailing claimant in cases where there is no reasonable basis for the institution of the forfeiture proceedings;
- 3) The ability of third party interests to try their case before a jury, because there is a constitutional right to a jury trial;
- 4) A standard that there must be a substantive nexus shown between the property and criminal activity before forfeiture is permitted;
- 5) Recognition that any forfeiture must be proportional to the harm caused by the offense and that the factors to determine proportionality must be set forth in a statute that can be uniformly applied by the courts.

These and other issues need to be addressed, said Atty. Kravitz, because there is no consensus among prosecutors and courts on them.

That is the case for every criminal statute on the books, declared Pros. White. He claimed that most of the suggestions offered by Atty. Kravitz would involve redefining case law. There is no need to legislate constitutional rights or plea bargaining, he insisted. Nor can we legislate how aggressively one prosecutor pursues forfeitures. He feels that Atty. Kravitz is attempting to create issues that do not need to be created. It is not possible to legislate remedies in response to bad attorneys, he concluded.

He conceded that he could agree to a uniform timeframe for notice and hearings. Innocent owner provisions already exist within most forfeiture statutes, so he feels nothing further is needed on that issue. He insisted that he cannot agree to another jury trial for third party innocent owners. He feels that goes far beyond due process requirements.

Mayor Jim McGregor asked whether we can trust the judge or prosecutor to be reasonable regarding innocent owner circumstances without having to go to the extent of a jury trial. He feels that few people could afford the expense of a jury trial to get their property back.

Mr. Diroll asked if the Commission agrees on the *Hyde Bill* recommendation of a substantial nexus between the property and criminal offense.

Atty. Kravitz agreed, but Pros. White insisted that it would create a major policy change. He prefers the current "used in" standard. In fact, he noted the State already has constitutional provisions in effect against disproportionate forfeitures.

In response to the hardship issue, he remarked that his district releases property for hardships all the time, but he does not feel that it can be easily defined statutorily. He declared it would only create new appeals for what qualifies as a hardship and what does not.

After lunch, Judge Bressler asked if the Commission could agree to attempt to place all forfeiture statutes, both civil and criminal, within one chapter.

Judge Schmitt insisted that the Commission should at least make an effort to do so. He suggests also trying to make the statutes somewhat consistent.

Asst. Pros. Muhek expressed serious reservation against taking drug forfeitures out of the drug section of statutes.

Mr. Diroll remarked that sentencing for all crimes is contained in one chapter and since forfeiture is regarded as a penalty, he is guardedly optimistic that it could be done.

Timeframes for notice and for hearings was an issue that seemed to receive consensus on the need for extensions, said Judge Bressler.

Atty. Kravitz suggested setting aside issues of special interest groups. He recommended first setting up a framework for civil and criminal procedures.

Pros. White prefers to deal with the heavy issues first. He does not want to save them until after everyone compromises on other issues and, in his opinion, there is no more room left for compromise.

Mr. Diroll said there seems to be consensus to: 1) attempt drafting a forfeiture chapter that would consolidate the civil and criminal forfeiture statutes as much as possible; 2) try to make the provisions more consistent; 3) develop consistent timeframes; 4) attempt to standardize the innocent owner provisions; and 5) temporarily set aside the more provocative issues of counsel, nexus between the property and criminal activity, attorney fees, etc.

The heavier issues, said Pros. White, should be addressed as they come up, rather than saving them until the end. He would prefer to have staff consolidate the statutes first, then have members vote on areas of controversy or difference as they come up within the context of the consolidated statutes.

Mayor McGregor and Asst. Pros. Steve McIntosh felt it would be possible to do both. They suggested getting a viable format first, then working through the document to see which issues need debate.

In addition to using the forfeiture outline developed by Asst. Pros. Muhek, Pros. White recommended developing an analysis of forfeiture case law. Provisions do not need to be codified if they are covered by case law.

Atty. Kravitz feels codifying some matters would ease confusion, noting that, currently, it is not just complicated for attorneys, but also a hardship for citizens, since they have to pay for the additional time it takes attorneys to decipher the forfeiture statutes.

If it will simplify matters to codify some of those issues, said Judge Schmitt, then we should make every effort to do so. However, if it will only create more of a hardship on citizens, then he acknowledged that it should be left for the courts to decide.

Atty. Herner remarked that she did not see notice provisions spelled out in the outline of forfeiture statutes.

In some cases, there is no need for defendant notice other than indictment, Asst. Pros. Muhek responded. He noted that, for \$1531.20 (unlawful taking of animals) and 2913.34 (trademark counterfeiting) there is no notice for the potential owner, just the user.

Attorney John Madigan recommended leaving Title 45 forfeitures (alcohol related vehicle forfeitures) in the Traffic Law.

JUVENILE SEX OFFENDER REGISTRATION

S.B. 3, which attempts to apply Megan's Law to juveniles, continues to be heard by the Senate Judiciary Committee, said Mr. Diroll. Sen. Scott Oelslager, chair of the Committee, asked the sponsor, Sen. Jay Hottinger to work out the problems with the bill.

The Commission staff, he noted, continues to discuss the Commission's recommendations with the sponsor and others. The Commission's recommendation is to tie community notice to SYO cases and allow judges discretion regarding the amount of time required for registration, up to the length of time required for adults.

He promised to keep the Commission informed on the progress of the bill.

Future Commission meetings are scheduled for April 19 and May 17.

The meeting adjourned at 1:45 p.m.